Amit bin Salleh & Ors v The Superintendent, Land & Survey Department Bintulu & Ors

HIGH COURT (BINTULU) — CIVIL SUIT NO 22–21 OF 2000 (BTU)
ABDUL AZIZ BIN ABDUL RAHIM J
12 MAY 2005

Native Law and Custom — Land dispute — Customary rights over land — Extinguishing native communal reserve on land — Claim for compensation for crops grown on land — Whether native customary rights over land acquired — Whether compensation payable even though replacement land given

Native Law and Custom — Land dispute — Customary rights over land — Joint venture agreement over land with non-native company — Whether agreement a colourable device to transfer native's rights and privileges in land to non-native — Whether agreement illegal for offending s 8 of Sarawak Land Code

The land in issue ('Lot 3') had been declared as native communal reserve for agricultural purposes by the Native Communal (Agriculture) Reserve Order 1987 ('1987 Order') for the benefit and use of the Kedayan/Melanau/Malay communities of Kuala Nyalau and Ulu Nyala, Suai Sarawak. Upon such declaration, the plaintiffs, representatives of the natives communities, entered into a joint venture agreement with BMSB, a non-native, to develop the land into an agriculture project. Pursuant to the agreement the land was planted with setang and teak trees. But before the trees could be harvested the parties terminated the agreement in 1997. The Land (Extinguishments of Native Customary (Rights) Similajau Area) (No 106) Direction 1998 ('the 1998 Direction') subsequently came into force in 1998 and extinguished the native communal reserve on the land. A replacement piece of land ('Lot 2') was given.

The plaintiffs claimed in respect of the value of commercially valuable trees — setangs and teaks — grown on the land. The defendants argued no compensation was payable because Lot 2 had been declared as native communal reserve in place of Lot 3 which had ceased to be one. The defendants argued that even though the plaintiffs may be compensated for the destruction of their crops on the land, they were not entitled to compensation for the setangs and the teaks that grow on Lot 3 because: (1) the trees belonged to the joint venture company BJSB; and since the non-native joint venture company was not entitled to any rights over Lot 3, it also could not then claim any rights over the trees attached to the land; (2) the trees were planted pursuant to an illegal contract between the plaintiffs and BMSB the latter being non-native. The joint venture agreement was said to be a colourable device to transfer the native's rights and privileges in and on the land to a non-native contrary to s8 of the Sarawak Land Code ('the Code'). There were two issues: (1) did the plaintiffs acquired native customary rights over Lot 3 by virtue of the 1987

Order; (2) if yes, whether the plaintiffs were entitled to be compensated for the crops (including trees of commercial value) planted on the land, under a joint venture agreement with a non-native company, when the native customary rights were extinguished by the 1998 Direction.

Held, ordering that the amount of compensation be assessed:

(1) In the 1987 Order, the native communities for whose use Lot 3 was declared as communal reserve were the Kedayans, the Melanaus and the Malays. Thus, the use of Lot 3 for agricultural purposes by the three communities would be regulated by their respective customary laws on land use and land rights. In this regard, the three communities had formed a committee among themselves and authorised the committee to enter into a joint venture agreement with BMSB and jointly developed the land by planting it with commercially valuable setangs and teaks (see para 12). Therefore, the natives communities referred to in the 1987 Order had acquired native customary rights as to land use over Lot 3 with the declaration of the land as native communal reserve (see para 14).

(2) The natives were entitled to compensation if their customary rights are extinguished. The customary rights of the natives to use and cultivate land reserved for them were property within the meaning of art 13(1) of the Federal Constitution (see para 154). Thus, to take away these rights would mean depriving the natives of the main source of their survival. Since in this case it had been shown that the plaintiffs had the rights to the native's communal reserve, the plaintiffs therefore were entitled to compensation for the extinguishment of the rights by the defendants (see para 17).

(3) The real object to the joint venture agreement was to have the land converted to the category of mixed zone for at least 60 years; and to have the land alienated to the joint venture company — a non-native. This alienation of the land to the joint venture company, had it gone through, would be clearly offensive to s 8(b) of the Code — which deemed an agreement that purportedly confer natives rights over native land to a non-native as been entered for an illegal consideration. Therefore the joint venture agreement was caught by s 24 and s 2 of the Contracts Act 1950, and was null and void (see para 24).

(4) Since the plaintiffs were not claiming to recover the consideration under an illegal agreement, s 8(e) had no application. When the joint venture agreement was rescinded the land together with everything on it, including the trees, indisputably reverted to the plaintiffs. Therefore, when the reserve was extinguished the natives were entitled to be compensated for the lost of their communal reserve as well as their crops. Furthermore, the rescission of the joint venture agreement took place long before the extinguishment of the reserve by the defendants. Thus,

at the time when the defendants gazetted the 1999 Order, the communal reserve was not subject to any joint venture agreement between the natives and non natives. The reserve wholly belonged to the natives then (see para 25).

[**Bahasa Malaysia summary**

Tanah berkaitan ('Lot 3') telah diisytiharkan kawasan simpanan anak watan bagi tujuan pertanian oleh Perintah Komunal Simpanan (Pertanian) Anak Watan 1987 ('Perintah 1987tersebut') untuk kemudahan dan kegunaan kaum Kedayan/Melanau/Melayu di Kuala Nyalau dan Ulu Nyala, Suai Sarawak. Berdasarkan deklarasi tersebut, plaintif-plaintif, wakil anak watan tersebut, telah memasuki satu perjanjian bersama dengan BMSB, yang bukan anak watan, untuk memajukan tanah tersebut menjadi projek pertanian. Menurut perjanjian tersebut tanah itu ditanami pokok-pokok setang dan jati. Bagaimanapun sebelum pokok-pokok itu dapat digunakan pihak-pihak telah menamatkan perjanjian dalam tahun 1997. Arahan Tanah (Pelenyapan Kawasan Adat (Hak-hak) Anak Watan) (No 106) 1998 ('Arahan 1998') telah berkuatkuasa pada tahun 1998 dan melenyapkan kawasan simpanan anak watan atas tanah itu. Sebidang tanah gantian ('Lot 2') telah diberikan.

Plaintif-plaintif menuntut nilai komersial pokok-pokok berharga tersebut — setang dan jati — yang tumbuh atas tanah itu. Defendan-defendan berhujah tiada pampasan boleh dibayar kerana Lot 2 telah diisytiharkan sebagai kawasan simpanan anak watan bagi menggantikan Lot 3 yang bukan lagi tanah sedemikian. Defendan-defendan berhujah bahawa meskipun plaintif-plaintif boleh memberi pampasan kerana memusnahkan tanaman mereka atas tanah tersebut, mereka tidak berhak mendapat pampasan untuk pokok-pokok setang dan jati yang tumbuh atas Lot 3 kerana: (1) pokok-pokok tersebut milik syarikat bersama BJSB; dan memandangkan syarikat bersama bukan anak watan tidak mempunyai hak ke atas Lot 3, ia juga tidak boleh menuntut apa-apa hak ke atas pokok-pokok yang tumbuh atas tanah tersebut; (2) pokok-pokok itu ditanam berikutan satu kontrak yang menyalahi undang-undang antara plaintif-plaintif dan BMSB yang bukan terdiri daripada anak watan. Perjanjian bersama itu dikatakan satu muslihat untuk memindahkan hak dan hak istimewa anak watan dalam dan atas tanah itu kepada yang bukan anak watan bertentangan dengan s 8 Kanun Tanah Sarawak ('Kanun tersebut'). Terdapat dua persoalan: (1) adakah plaintif-plaintif memperoleh hak adat anak watan ke atas Lot 3 menurut Perintah 1987; (2) jika ya, sama ada plaintif-plaintif berhak diberikan pampasan untuk tanaman (termasuklah pokok-pokok yang bernilai komersial) yang ditanam atas tanah itu, di bawah perjanjian bersama dengan syarikat bukan anak watan, memandangkan hak-hak adat anak watan telah dimansuhkan oleh Arahan 1998.

Diputuskan, memerintahkan jumlah pampasan ditaksirkan:

(1) Dalam Perintah 1987, kawasan tanah anak watan yang mana penggunaan Lot 3 diisytiharkan sebagai kawasan tanah simpanan adalah Kedayan, Melanau dan Melayu. Oleh itu, penggunaan Lot 3 untuk tujuan pertanian oleh tiga kaum tersebut akan dikawal oleh undang-undang adat masing-masing berhubung penggunaan tanah dan hak ke atas tanah. Oleh demikian, ketiga-tiga kaum tersebut membentuk satu jawatankuasa antara mereka dan membenarkan jawatankuasa itu memasuki satu perjanjian bersama dengan BMSB dan bersama memajukan tanah tersebut dengan menanamnya dengan pokok-pokok setang dan jati yang mempunyai nilai komersial (lihat perenggan 12). Dengan itu, kaum masyarakat anak watan yang dirujuk dalam Perintah 1987 memperoleh hak-hak adat anak watan berhubung penggunaan tanah atas Lot 3 dengan deklarasi tanah tersebut sebagai kawasan tanah anak watan (lihat perenggan 14).

(2) Anak watan berhak mendapat pampasan jika hak-hak adat mereka dimansuhkan. Hak-hak adat anak watan untuk menggunakan dan memajukan tanah yang dirizabkan untuk mereka adalah harta dalam maksud perkara 13(1) Perlembagaan Persekutuan (lihat perenggan 154). Oleh itu untuk mengambil hak-hak tersebut akan melenyapkan sumber utama untuk sara hidup anak watan. Memandangkan dalam kes ini telah dibuktikan bahawa plaintif-plaintif mempunyai hak ke atas kawasan tanah simpanan anak watan itu, plaintif-plaintif dengan itu berhak mendapat pampasan kerana pelupusan hak-hak oleh defendan-defendan (lihat perenggan 17).

(3) Tujuan utama perjanjian bersama tersebut adalah untuk menukarkan tanah itu menjadi kategori zon campuran selama 60 tahun; untuk memberimilik tanah itu kepada syarikat bersama — bukan anak watan. Pemberimilikan tanah ini kepada syarikat bersama, jika diteruskan, dengan jelas akan bertentangan dengan s 8(b) Kanun tersebut — yang menganggap perjanjian yang bermaksud memberikan hak-hak anak watan ke atas tanah adat kepada yang bukan anak watan sebagai balasan yang menyalahi undang-undang. Oleh itu perjanjian bersama itu terhadang oleh ss 24 dan 2 Akta Kontrak 1950, dan adalah terbatal dan tidak sah (lihat perenggan 24).

(4) Memandangkan plaintif-plaintif tidak berhasrat untuk menuntut balasan di bawah perjanjian tidak sah itu, s 8(e) tidak terpakai. Apabila perjanjian bersama itu dibatalkan, tanah tersebut bersama segala apa di atasnya, termasuklah pokok-pokok, telah dikembalikan tanpa pertikaian kepada plaintif-plaintif. Oleh itu apabila kawasan tanah simpanan itu dilupuskan, anak watan berhak mendapat pampasan kerana kehilangan kawasan tanah simpanan mereka bergitu juga tanaman mereka. Tambahan pulan, pembatalan perjanjian bersama berlaku sebelum pelupusan kawasan tanah simpanan itu oleh defendan-defendan. Oleh itu pada masa apabila

defendan-defendan mewartakan Perintah 1999, kawasan tanah simpanan itu tidak tertakluk kepada apa-apa perjanjian bersama antara anak watan dan bukan anak watan. Kawasan tanah simpanan itu dimiliki keseluruhannya oleh anak watan pada masa itu (lihat perenggan 25).]

Notes

For cases on customary rights over land, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 632–639.

Cases referred to

Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor [1997] 1 MLJ 418 (refd)
Badang ak Bunsu v Sungei Emas Aquaculture Sdn Bhd Originating Summons No 24–146 of 2003, unreported (refd)
Datuk Ong Kee Hui v Sinyium Anak Mutit [1983] 1 MLJ 36 (refd)
Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors [1998] 2 MLJ 158 (refd)
Manang Lim Native Sdn Bhd v Manang Selaman [1986] 1 MLJ 379 (refd)
Mustafa bin Osman v Lee Chua & Anor [1996] 2 MLJ 141 (refd)
Petroleum Nasional Bdn v Kemjaan Negeri Trengganu & *Anor* [2003] 4 CLJ 337 (refd)
Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd [1980] 1 MLJ 21 (refd)
Skarf Development Sdn Bhd v KM Engineering Development Sdn Bhd [1998] MLJU 275 (refd)
Tan Bing Hock v Abu Samah [1968] 1 MLJ 221 (refd)

Legislation referred to

Contracts Act 1950 ss 2(g), 24
Federal Constitution art 13(1)
Land (Extinguishments of Native Customary (Rights) Similajau Area) (No 106) Direction 1998
Native Communal (Agriculture) Reserve Order 1987
Native Communal Reserve (Cessation) Order 1999
Rules of the High Court 1980 O 14A
Sarawak Land Code ss 2, 5(1), (2), (3), (4), 6(1), (2), (3), (4), 8(b), (e)

John Antau (Musa Dinggat with him) (Tang & Antau Co) for the plaintiffs.
Susan Gau (Kezia Norella Daim with her) (State Attorney General's Chambers) for the defendants.

Abdul Aziz bin Abdul Rahim J:

[1] This is an application by the plaintiffs under O 14A of the Rules of the High Court 1980 ('the RHC') for the determination by this court several questions of law as set out in the plaintiffs' summons in chambers dated 6September 2004 (encl 29).

[2] Altogether there are five questions are framed for the court determination, the answer to which would finally decide the issues between the parries. However, having regard to the five questions, the issues that the five questions have raised may be determine once and for all by rephrasing the five questions into only two questions and answer them accordingly. Under O 14A the court is given the discretion, after giving due consideration to the nature of the dispute between the parties and the questions posed by the applicant, to rephrase the questions posed or to frame its own questions for determination if such recourse would finally settle the issues between the parties. In *Petroleum Nasional Bdn v Kemjaan Negeri Trengganu* & *Anor* [2003] 4 CLJ 337, the Court of Appeal said at p 363, as regard to the power of the court under O 14A of the RHC, as follows:

> ... the learned judge should consider whether on the available undisputed facts he will be in a position to determine the core or primary issue and/or some or all the subsidiary issues and causes of action. If he is in a position to do so, he should then frame additional questions or drop or recast the questions framed as he thinks fit and proceed to determine the issues and causes of action.

[3] That is what I am going to do now.

[4] The first question which I will frame is this: Did the plaintiffs acquired native customary rights over Lot 3 Block 29 Suai Land District (later described as Lot 3 Block 52 Kemena Land District) measuring 1223 hectacres more or less ('the said land') by virtue of the The Native Communal (Agriculture) Reserve Order 1987 ('1987 Order') under Gazette Notification date 1 April 1987? The second question is this: If the answer to the first question is in the affirmative are the plaintiffs entitle to be compensated for the crops (including tress of commercial value) planted on the said land, under a joint venture agreement with a non native company, when the native customary rights were extinguished by the Land (Extinguishments of Native Customary (Rights) Similajau Area) (No 106) Direction 1998 published in Gazette Notification dated 31 December 1998 by the second defendant.

[5] The background to the present application is as follows: On 13 April 2000, the plaintiffs took out a writ of summons against the defendant indorsed with a claim, inter-alia, for special damages in the sum of RM10,493,180, general damages and further or in the alternative compensation for the loss due to being deprived of their rights over the said land.

[6] In their defence to the plaintiffs' statement of claim that was filed together with the writ the defendants, the defendants deny that the plaintiffs were Kedayan/Melanau/Malay communities of Kuala Nyalau. The defendants also deny that the plaintiffs' ancestors were inhabitants/occupiers of and native customary rights land owners over the said land. Further, the defendants averred that there is no native customary rights ever created or acquired over the said land.

[7] In the face of this defence, the plaintiffs filed the present application on 7 September 2004. **A**

[8] At the commencement of the hearing of the present application, Iasked the learned state legal officer, who represented the defendants, whether the defendants still stand by their denial that the plaintiffs are not natives belonging to the Kedayan/Melanau/Malay communities of Kuala Nyalau and that they do not have customary rights over the said land. In my view, if these facts are in dispute then the present application cannot proceed under O 14A of the RHC. That Order only allows the court to determine issues of law where the facts are not in dispute. If the primary facts that are necessary for the determination of the question of law are in dispute then O14A is not applicable. This is so because the issues of facts must be decided based on evidence of witnesses that can testify to the existence of those primary facts. When confronted with this question from the court, the learned state legal officer conceded that for the purpose of the present application the plaintiffs are natives covered by the 1987 Order. With this concession I proceeded to hear the plaintiffs' application in encl 29. **B** **C** **D**

[9] In his brief written submissions, learned counsel for the plaintiffs advanced the following grounds and arguments:

(a) the 1987 Order the said land was declared as native communal reserve for the purpose of agriculture. By this Order the plaintiffs acquired substantive and identifiable rights over the said land. If these rights are extinguished and the land is acquired by the defendants then the plaintiffs are to compensated not only for the lost of the land but also for the crops planted on the land. **E** **F**

(b) by the same 1987 Order the plaintiffs have the right to develop the land for agricultural purposes. The Order was made under s 6(1) of the Sarawak Land Code ('the Code') and the Gazette Notification explicitly states that the purpose was agriculture. **G**

(c) the joint venture agreement entered between the plaintiffs and a non native company to develop the said land by planting on the land trees which have commercial value such as setang, jati etc is lawful and does not contravene s 8 of the Code and also in tandem with the policy of the State Government to encourage the development of native customary rights land with private sector through joint ventures regardless whether the joint venture partner is a native or not. It was submitted that s 8 of the Code does not bar such joint venture. **H**

(d) That s 8 of the Code should not be interpreted so as to stifle a bona fide economic joint venture between natives and non natives to develop natives customary land. Section 8 of the Code should only be used to prohibit colourable device or scheme that would deprive the natives of **I**

their land to non natives. Such deprivation must be in clearest of cases whereby the net effect is the transfer of natives right or ownership over the land to the non native. A good example is a power of attorney gives a non natives power to sell or charge native land in the name of joint venture and development. He referred to *Badang ak Bunsu v Sungei Emas Aquaculture Sdn Bhd* in Originating Summons No 24–146 of 2003 (BTU) (the unreported decision of this court given on 20 July 2004).

(e) Crops (including the commercially valuable trees) grown or planted on the said land are property within the meaning of art 13 of the Federal Constitution; and that article provides that no person shall be deprived of his property unless in accordance with the law and with compensation. So when the defendants extinguished the natives rights over the said land destroyed the crops, the plaintiffs are entitled to be compensated.

(f) The crops and the trees grown and planted on the said land under the joint venture agreement rightly belong to the plaintiffs. This is so because the joint venture was rescinded long before the 1987 Order was gazetted. About one year before. By then the crops and the commercially valuable trees were already growing on the land.

(g) Alternatively it was submitted that under s 8(e) of the Code the native's rights over native's customary land or native's reserves are not affected by the illegality of the joint venture agreement, if it is truly the case. This section is a complete protection for the natives.

[10] Learned state legal officer ('SLO') for the defendants, in her written submissions, on the other hand argued as follows:

(1) The plaintiffs rights under the 1987 Order would be limited to using the land for the purpose of agriculture in accordance with the creation of the area as a native communal reserve. But the land, by virtue of s 6(3) of the Code continues to be state land and natives hold the land as licensees from the government.

(2) The defendants do not deny that the 1987 Order confers on the plaintiff exclusive right to use the land for the purpose of agriculture. The defendant also agree that the said land as native communal reserve falls within the definition of native customary land in s 2 of the Code and therefore is also governed by s 8 of the Code.

(3) The plaintiffs cannot recover their investment from the joint venture with Bumisar Mewah Sdn Bhd ('BMSB') because it is illegal and contravenes s 8 of the Code. BMSB is a corporate body and a non-native. So is the joint-venture vehicle Bumisar Jaya Sdn Bhd ('BJSB') — see *Manang Lim Native Sdn Bhd v Manang Selaman* [1986] 1 MLJ 379. BMSB and BJSB do not come within the saving provisions of s 9 of the Code. This fact is admitted by the plaintiffs — see para 7 of John Antau's affidavit. Section 8

of the Code is clear: non native may not acquire any rights or privileges whatever over native land area, native customary land or interior area land. Any agreement that purportedly transfer or confer such rights or privileges on non native is deemed to have been entered into for illegal consideration and such consideration, if have been given shall not be recoverable in any court.

(4) The plaintiffs are also not entitled to any compensation for the crops and trees on the land by virtue of ss 2(g) and 24 of the Contracts Act 1950 ('the Contracts Act'). Section 24 of the Contracts Act provides that any agreement whose object is unlawful is void. And s 2 of the same Act provides that a void contract is not enforceable by law.

(5) The natives rights were extinguished by Land (Extinguishment of Native Customary Rights) (Similajau Area) (No 106) Direction 1998 made under s 5(3) and (4) of Code by the second defendant on 28 November 1998 and gazetted on 31 December 1998 vide GN No 3538/1998 ('the 1998 Direction'). And by virtue of the Native Communal Reserve (Cessation) Order 1999 made under s 6(2) of the Code by the second defendant on 5 May 1999 ('1999 Order) and gazetted in Sarawak Government Gazette LN 35/1999 on 3 June 1999 the land ceased to be a native communal reserve. In exchange for the extinguishments of the native's rights and the cessation of the native communal reserve, another piece of land known as Lot 2 Block 51 Kemena Land District was approved by the third defendant for the use of the said natives. Therefore it was submitted that no question of compensation arises since the land had been replaced by another piece of land. The replacement is in compliance with the proviso to s 5(3) of the Code which empowers the minister to issue direction to extinguish natives customary rights over land subject to compensation being paid to the affected natives or a replace of the land over which the rights have been extinguished.

(6) It is also against public policy to allow the joint-venture company BJSB, a non native to acquire rights and privileges over the land under a void joint-venture agreement. The court should not assist in the enforcement of the illegal joint- venture agreement. Learned SLO cited *Sim Tony v Lim Ah Gee (t/a Phil Real Estate & Building Services)* [1994] 3 SLR 224 and *Datuk Ong Kee Hui v Sinyium Anak Mutit* [1983] 1 MLJ 36.

(7) It is also submitted by the learned SLO that the plaintiffs are not entitled to the trees planted on the land per se because the trees were planted by the joint-venture company BJSB and not by the plaintiffs. This, the learned SLO submitted, is notwithstanding that s 2 of the Code defines 'land' to include things attached to the earth or permanently fastened to anything attached to the earth. The learned SLO conceded in his written submission that trees planted on the land pursuant to the joint-venture

agreement fall within this definition of land. However since the joint-venture company being non native is not entitled to any rights or privileges over the land, it also cannot claim any rights or privileges over the trees planted on the land. The court must not let the plaintiffs reap the benefit sowed with the seed of iniquity and that any loss suffered by the plaintiffs and the non natives must lie where it falls. The cases of *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21, *Skarf Development Sdn Bhd v KM Engineering Development Sdn Bhd* [1998] MLJU 275, *Tan Bing Hock v Abu Samah* [1968] 1 MLJ 221 and *Mustafa bin Osman v Lee Chua & Anor* [1996] 2 MLJ 141 were cited as authorities for the proposition.

(8) It was also submitted that the plaintiffs are not entitled to compensation because an alternative parcel of land that is Lot 2 has been allocated for plaintiffs use. This fact is admitted by the plaintiffs. Furthermore in paragraph 15 of John Antau's affidavit filed on behalf of the plaintiffs, it was averred that the plaintiffs had abandoned the monetary compensation for the said land.

(9) Under Clause 1 of the Recession Agreement that rescinded the JV Agreement, the parties to the Recession Agreement one of whom are the plaintiffs had mutually agreed to rescind and annul the JV Agreement without any compensation to or claim by any party thereto. So by this clause, the plaintiffs cannot sustain this claim for compensation for the trees. In any event, the JV agreement being an illegality, the right to the planted trees over the said land Lot 3 cannot devolve from the non native to the natives.

OPINIONS AND FINDINGS OF THE COURT

[11] The undisputed facts in this application are these: the said land, ie Lot 3 had been declared as native communal reserve for agricultural purposes by the 1987 Order for the benefit and use of the Kedayan/Melanau/Malay communities of Kuala Nyalau and Ulu Nyala, Suai. Upon such declaration, the plaintiffs, whom have been appointed by the natives communities to represent them, entered into a joint venture agreement with BMSB to develop the said land into an agriculture project. The share in the joint venture Company was 75:25 in favour of BMSB. Pursuant to the joint venture agreement the said land was planted with trees of commercial value namely setang and teak. But before the trees could be harvested the plaintiffs and BMSB decided to terminate the joint venture agreement. The termination is effected by a Rescission Agreement dated 16 March 1997. This was before the coming into force of the 1998 Direction. The 1998 Direction came into force on November 1998. It extinguishes the native communal reserve on the said land. However, following the extinguishment, another piece of land known as Lot 2 was given as a replacement.

[12] In my opinion, the concession by the learned state legal officer Susan Gau that the plaintiffs are the natives covered by the 1987 Order renders the question whether the plaintiffs the natives community under that Order as a non issue. The next question is whether the plaintiffs as natives have acquired the native's customary rights by virtue of the Order? In my opinion, they have. The 1987 Order was made under s 6(1) of the Code. Section 6(2) of the Code provides that save in so far as the contrary may be specified or provided for in any such order or by the section, rights in any land declared to be native communal reserve under subsection (1) of the section shall be regulated by the customary law of the community for whose use the land was declared as reserved. To my mind, this means that unless the 1987 Order specified otherwise or that s 6 of the Code provides a regulation of rights over land declared as native communal reserve under s 6(1) of the Code that is contrary to the practices or regulation of such rights amongst the natives then the exercise of the rights over the land that has been declared as such shall be regulated in accordance with the customary law of the natives for whose use the reserve is declared. In this particular instance, the rights to the natives communal reserve so declared is the right to use the land for agricultural purposes. In the 1987, Order the native communities for whose use Lot 3 was declared as communal reserve are the Kedayans, the Melanaus and the Malays. Thus the use of Lot 3 for agricultural purposes by the three communities would be regulated by their respective customary laws on land use and land rights. But in this regard the three communities have, in their wisdom, seen it wise and proper to form a committee among themselves and authorised the committee to enter into a joint venture agreement with BMSB and jointly developed the said land by planting it with commercially valuable setangs and teaks.

[13] It is apparent from s 5(1) of the Code that no native customary rights may be created after 1 January 1958. Subsection (2) of the same section expressly provides for the methods by which native customary rights may be created. But even using such methods to create the rights no such rights would be recognized if they are created after the above date. Nevertheless subsection (1) of s 5 of the Code exempted the native communal reserve and the right of way created after that date. I have come to this conclusion because the non- recognition of native customary rights created after 1 January 1958 under s 5(1) of the Code is without prejudice to the provisions in the Code in respect of native communal reserve and rights of way.

[14] Therefore, I have no doubt in my mind that the natives communities referred to in the 1987 Order had acquired native customary rights as to land use over Lot 3 with the declaration of the said land as native communal reserve.

[15] The next question is whether the natives are entitled to compensation if their customary rights are extinguished. I think the answer is quite obvious that they are entitled to be compensated. Article 13(1) of the Federal Constitution provides that no person shall be deprived of property save in accordance with

law. In my view the customary rights of the natives to use and cultivate land reserved for them are property within the meaning of art 13(1) of the Federal Constitution. In *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418, the learned judge, in considering whether the common law rights and the statutory rights of the aborigines of Peninsular Malaysia over their reserve land and the forest in which they depend for their livelihood are protected under art 13 of the Federal Constitution, said at p 432:

> The plaintiffs' counsel submitted that the rights accorded to the aboriginal people by common law and statutory law are proprietary rights within the ambit of art 13(1) of the Federal Constitution and that when these rights are taken away by the defendants, the plaintiffs should be compensated pursuant to art 13(2).
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> To answer this question, we have to determine whether the rights accorded to the plaintiffs under common law and statutory law as described earlier are proprietary rights protected by art 13(1), or in other words, do the rights accorded to the plaintiffs fall within the ambit of art 13(1), and which is to be adequately compensated by art 13(2) if compulsorily acquired or used.
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> The word 'property' appearing in art 13(1) is a legal word and should be accorded its legal meaning. There is a similar provision to our art 13 in the Indian Constitution arts 19(1)(f) and 31. There are numerous Indian constitutional cases which have defined the word 'property' and I rely on the case of *Rabindra Kumar v Forest Officer* AIR 1955 Manipur 49 at pp 53–54 which eloquently sets out the meaning of the word 'property' as used in a constitutional context:
>
> > It has been contended that the petitioner cannot seek any relief under arts 19(1)(f) and 31 of the Constitution for his 'property' right has not been infringed at all. The argument is that the lease dated 24 February 1955, is not a completed contract and it is only a permit and so the petitioner did not acquire any property through it. I think this contention of the respondents has no force. The words 'property' has been explained in *Corplus Juris* (Vol 73) p 136 as follows:
> >
> > In legal usage 'property' is perhaps the comprehensive word which can be employed and it may signify either the subject matter in which interest exists or it may signify valuable rights and interests protected by law or it may signify both. Itis generally recognized that property includes certain rights such as the right of acquisition, possession, use, enjoyment and disposition. In legal usage, the word property is a generic term. According to the authorities on this question it is a term of broad and extensive application and it is also a term of large import with the very broadest and most extensive signification. It is a very comprehensive word having broad and comprehensive and exceedingly complex meanings and is perhaps the most comprehensive of all the terms that can be use.
> >
> > The word property includes both real and personal property and ordinarily will be construed as meaning both real and personal property. It includes both intangible rights and physical things.
> >
> > In the strict legal sense, the word property signifies valuable rights or interests protected by law and this is the primary appropriate and broader signification of

the term. In modern legal system, property includes practically all valuable rights, the term being indicative and descriptive of every possible interest which a person can have in any and every thing that is the subject of ownership by man and including every6 valuable interests, it can be enjoyed as property and recognized as such equitable interests as well as legal interests and extending to every species of valuable rights or interests in either real or personal property or in easements, franchises and incorporal hereditaments.

The term comprises also all rights which are incidental to the use, enjoyment and disposition of intangible things, the bare possession, with colour or right of anything of value, the right to be protected in one's possession of a thing or in one's privileges belonging to him as an individual or secured to him as a member for the Commonwealth including the right to contest judicially any invasion of that which one possesses or owns.

The property may reasonable be construed to include obligation rights and other intangible and physical things and thus the word 'property' means not only the thing but also the rights in the physical and corporeal thing which are created and sanctioned by law.

It is generally recognized that property includes the right of acquisition, the right of dominion, the right of possession, the right of use and enjoyment, the right of exclusion and the right of disposition.'

The Federal Court in the case of *Selangor Pilot Association* (1946) *v Government of Malaysia & Anor* [1975] 2 MLJ 66 at p 69, per Suffian LP said:

> The language of our art 13 is not identical with, but it certainly approximates to, the language of the Indian art 31 before the 1955 amendment which added the new clause (2A). The absence of a similar clause from our art 13 persuades me to adopt the construction placed on the Indian article by the Indian Supreme Court on the unamended art 31.

I would therefore agree with the wide interpretation given to proprietary rights under art 13 and hold that the plaintiffs' rights both under common law and statutory law are proprietary rights protected by art 13 of the Federal Constitution.

[16] The above view was upheld by the Court of Appeal when it dismissed the appeal by the defendants in that case (see [1998] 2 MLJ 158; pp 162 and 164). Though the common law rights and the statutory rights over land in *Adong bin Kuwau* are rights belonging to the aboriginal people of the Peninsula Malaysia, these rights in my view are similar to the native customary rights over native communal reserve of the natives of Sarawak. It is not in dispute that the aboriginal people involved in *Adong bin Kuwau* are natives of the Peninsula. Therefore the views expressed in that case is pertinent and very relevant to the determination as to the nature and the protection of the native customary rights over native land and native communal reserve in Sarawak.

[17] In this instant case, these rights entitled the natives to use and cultivate their land in such manner that may bring them income and along with it the

betterment of their life. The economic use of the land to sustain their livelihood is synonymous with the sustenance of their existence as an entity. Thus, to take away these rights would mean depriving the natives of the main source of their survival. Their dependence on the land is something that no one can deny. Besides the authority of *Adong bin Kuwau*, I am also fortified in this view by subsection (4) of s 6 as amended by Act 78/2000 that provides for compensation to be paid to any person lawfully having rights or privileges over native communal reserve which has been resumed by the government. Furthermore the proviso to s 5(3) of the Code also provides that any person who can established his claims to native customary rights which have been extinguished shall be paid compensation whether with or without payment for additional payment of compensation for disturbance, costs of removal or otherwise for such extinguishment. Since in this case it has been shown that the plaintiffs have the rights to the native's communal reserve, the plaintiffs therefore are entitled to compensation for the extinguishment of the rights by the defendants.

[18] The extinguishment of the native communal reserve in this case is not disputed. The reserve ceased to be a reserve with the gazette notification of the 1999 Order. Thus on the foregoing reasons in the preceding paragraphs the plaintiffs ought to be compensated. The defendant did not deny this. But the defendants argument is that in this case no compensation is payable because another piece of land that is Lot 2 had been declared as native communal reserve in place of Lot 3 which had ceased to be one. The plaintiffs admitted that Lot 2 was declared and given to them as a replacement. However the plaintiffs said their claim is not for the lost of the said land. Their claim is in respect of the value of commercially valuable trees — setangs and teaks — grown on the said land.

[19] Setang and teak are commercially valuable trees. There is no doubt about that. The defendants also did not deny their value. If the trees were allowed to grow and mature to a size where they would be ready for harvest they would surely bring in a handsome income to the natives. It is to be observed that the natives in this case had embarked on a joint venture project to develop the land agriculturally with a purpose that the project would alleviate their economic and social life and make it better. With that sense of purpose they consciously planted Lot 3 with setangs and teaks for their commercial value. They planted the trees not to populate the said land with trees and vegetation. They planted them with a view of harvesting them when they reached maturity and sell them as the produce of the land to earn income from the land. Therefore in my view, it would reasonable to treat the value of the land and that of the trees as a separate item of value for the purpose of determining the compensation payable to the plaintiffs following the extinguishment of their native communal reserve. It will be observed that the proviso to subsection (3) of s 5 of the Code seems to make this approach

possible. The proviso speaks about paying compensation 'with or without the payment of additional compensation whether for disturbance, or for the costs of removal, or otherwise'. The use of the words 'additional compensation, and 'or otherwise' in the proviso, in my opinion, removes any doubt that one may have as to the range of compensation that may be payable to the natives whose customary rights have been extinguished. In my view, it is reasonable to conclude that this would include compensating the natives for the loss they suffered when their crops on the land, which they have grown for their income, are destroyed. The setangs and the teaks are, in this instant case, is in this category.

[20] Miss Susan Gau, the learned SLO, argued that even though the plaintiffs may be compensated for the destruction of their crops on the land, they are not entitled to compensation for the setangs and the teaks that grow on Lot 3. Firstly she argued that the trees did not belong to the plaintiffs. They belonged to the joint venture company BJSB; and the joint venture company BJSB is not a native. Therefore, it cannot have a claim over the said land. Thus, the learned SLO argued that since the non-native joint venture company is not entitled to any rights over Lot 3, it also cannot then claim any rights over the trees attached to the said land. Secondly, the trees were planted pursuant to an illegal contract between the plaintiffs and BMSB the latter being non-native. The joint venture agreement is a colourable device to transfer the native's rights and privileges in and on the land to a non-native — something that is prohibited under s 8 of the Code. She submitted that joint venture agreement being an illegal agreement is void and unenforceable. She cited ss 24 and 2(g) of the Contracts Act 1950.

[21] Section 24 of the Contracts Act 1950 provides that an agreement whose consideration or object is unlawful is void. Paragraphs (a), (b) and (e) of s 24 of the Contracts Act 1950 stipulate that a consideration or object which is forbidden by law, or of a nature, if permitted, would defeat any law or if the court regards it as immoral or opposed to public policy, respectively, is an unlawful consideration or object. Section 2 of the Contracts Act 1950 provides that an agreement not enforceable by law is said to be void.

[22] Is the joint venture agreement void agreement under s 24 of the Contracts Act 1950? The joint-venture agreement was between the plaintiffs and BMSB who was non-native. The objective of the joint-venture agreement was to develop Lot 3 on joint-venture basis between the plaintiffs and BMSB. For this purpose the plaintiffs and BMSB had agreed to form a joint venture company called BJSB to carry out the development of Lot 3. The shareholding in the joint-venture company is 75:25 in favour of BMSB the non-native. Atthis point, it is to be observed that there is nothing in the Code or in any other written law that I am aware of that prohibits the natives to enter into joint venture agreement and formed a joint venture company with a non-native. However, the question as to the legality of the joint venture company

in this case must also take into consideration the provision of s 8(b) of the Code. Under this section, an agreement is deemed to have been entered into for illegal consideration if it transfers or confers any rights or privileges over native area land, native customary land or interior area land to non native; or which would result in such person enjoying any such right or privilege. This provision thus calls for the examination of some of the terms in the joint venture agreement. The joint venture agreement is exhibited as exh 'JAL 2' in John Antau anak Linggang's affidavit in support of the plaintiffs' application in encl 29. Clause 1(1) of the joint venture agreement states that the principal object of the joint venture company is the development of the land into agricultural purpose. Clauses 1(3) and 1(5) provide for the shareholding and the appointment of directors in the joint venture company respectively. From these two Clauses it is obvious that the joint venture company was controlled by BMSB — a non native — who held 75% of the share capital in the joint venture company and also had the right to appoint six out of eleven directors of the joint venture company. Clause 3(1) then provides that Development Committee, which represented the plaintiffs and also a party to the joint venture agreement, shall apply to the relevant authorities for the alienation and transfer of the said land to the joint venture company who was also non native; and for the conversion of the said land from native communal reserve into mixed zone for a period of at least 60 years.

[23] There is no doubt that BMSB, the majority shareholder of the joint venture company BJSB, and the joint venture company is non-native. They are corporate bodies being companies formed under the Companies Act 1965. In *Manang*, it has been ruled that natives only refer to natural person and not a legal person such as a corporate body or a company. However, this fact by itself does not render the joint venture agreement as illegal and void. Learned counsel for the plaintiffs rightly submitted that there is no law that prevents natives and non natives from entering into a joint venture agreement for the purpose of development of natives land. In fact, it is submitted, that such arrangement should be encouraged and in tune with the current government policy of promoting joint ventures for economic developments between the natives and non-natives. I agree. But it is also my view that any such agreement, if contravenes s 8(b), the first limb, would be struck down for being unlawful as the object or purpose of that joint venture agreement is unlawful.

[24] Having regard to the terms of the joint venture agreement, in particular the clauses I alluded to above, it seems to me that the real object to the agreement is to have the land converted to the category of mixed zone for at least 60 years; and to have the land alienated to the joint venture company. Since the joint venture company was controlled by BMSB who held 75% of the shares in the joint venture company, the dealing with the land after its conversion to mixed zone and its alienation to the joint venture company would be determined by BMSB — a non native. The provision of cl 11 of the

joint venture agreement lends support to this possibility. That clause provides that the Development Committee (meaning the plaintiffs) shall not engage in any negotiation for the purpose of developing the land except with the company. And the company under that clause means BMSB. If the alienation of the land to the joint venture company had gone through, the land would be practically transferred to a non-native. To my mind such provisions as to the alienation of the land to the joint venture company is clearly offensive to s 8(b) of the Code. I am of the view because s 8(b) of the Code clearly states that an agreement, that purportedly transfer or confer natives rights or privileges over native land to non native or one that would result in such person enjoying such rights or privileges, is deemed to have been entered for an illegal consideration. Therefore, in my opinion, the joint venture agreement is caught by ss 24 and 2 of the Contracts Act 1950. Thus, I conclude that the joint venture agreement is null and void. Learned counsel for the plaintiffs drew my attention to my decision in *Badang ak Bunsu v Sungei Emas Aquaculture Sdn Bhd* (unreported) where I have held that a joint venture between natives and non-natives was valid and did not infringe s 8 of the Code. In my view, there cannot be a general statement of law that all joint venture agreements between natives and non-natives are valid and do not infringe section 8 of the Code. The validity or legality of such agreement must be determined according to the terms and conditions contained in the agreement itself. In *Badang Bunsu*, there is no such clause as cl 3(1) in the present joint venture agreement. Furthermore in the *Badang Bunsu* there was no provision for conversion of the natives customary land into mixed zone and that at the end of the period of the joint venture the land would revert back to the natives. The agreement in *Badang Bunsu* also contained provision that allowed the natives to give notice to terminate the joint venture. Those provisions are not found in the present joint venture agreement in this case. Therefore, I cannot accede to the request by the learned counsel for the plaintiffs.

[25] Having found the joint venture agreement between the Development Committee, that represented the plaintiffs, and the BMSB is void, can the plaintiffs recover damages or be compensated for the loss sufferoU due to the destruction of the crops on their land particularly the commmetcially valuable setangs and teaks? Learned counsel for the plaintiffs submitted they could. He argued tlnat the consequence of an illegal contract between the natives and the non-natives is spelt out in s 8 of the Code. He submitted that there is nothing in s 8 of the Code that say that the plaintiffs rights as natives would be forfeited due to any breach of the section. He further submitted that s 8(e) of the Code the rights and privileges of any natives shall not be adversely affected by any agreement to which para (b) of s 8 the Code applies. He contended that the net effect of paras (b) and (e) of s 8 of the Code is that the non native would lose their investments and shares in the joint venture to the native in the native land. Thereafter the investment would solely become the natives' property. The land together with any improvements as a result of the non-native

investment will become the natives' properties. Therefore if the defendants extinguished natives' rights or acquired the natives land, then the natives must be compensated for. Learned SLO disagrees with the submissions by learned counsel for the plaintiffs. She advanced two reasons. Firstly, under s 8(b) of the Code any consideration which shall have been paid or furnished shall not be recoverable in any court nor shall any relief be afforded to any person claiming that any consideration promised has not been paid or furnished. Secondly, the joint venture agreement being an illegality, the right to the trees planted on Lot 3, the said land, cannot 'devolve' from non-natives to the natives. In my opinion, the submissions by the learned SLO is flawed for two reasons. First, the plaintiffs are not claiming or trying to recover the consideration under an illegal agreement that has been paid or promised to be paid. Thus, s8(e) in my view has no application. Second, 'land' as defined in s 2 of the Code includes things attached to earth or permanently fastened to anything attached to the earth. Since the setangs and teaks are permanent attached to the earth on Lot 3 they formed part of the land. Thus, when the joint venture agreement was rescinded the land together with everything on it, including the trees, indisputably revert to the plaintiffs. This fact is disputed. In fact in this case, the natives communal reserve had never been converted to mixed zone or alienated to the joint venture company or the company. Thus, there is no question of devolution of the trees from the non natives to the natives. The trees formed part of the land and the land remained as native communal reserve after the rescission of the joint venture agreement. Therefore, when the reserve is extinguish, the natives are entitled to be compensated for the lost of their communal reserve as well as their for their crops. Furthermore, the rescission of the joint venture agreement took place long before the extinguishment of the reserve by the defendants. Thus, at the time when the defendants gazetted, the 1999 Order the communal reserve was not subject to any joint venture agreement between the natives and non natives. The reserve wholly belonged to the natives then.

[26] For the above reasons, I will answer the two questions I have framed in lieu of the questions posed by the plaintiffs in affirmative. Accordingly therefore, I will order that the amount of compensation for the trees, ie the setangs and the teaks be assessed and the plaintiffs must prove their actual loss (excluding the value of the land). Cost of this application to the plaintiffs and costs to be taxed unless agreed.

Order for compensation to be assessed.

Reported by Loo Lai Mee